Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-1280

BRENDA MCCLASKEY, APPELLANT,

V.

PETER O'ROURKE,
ACTING SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before SCHOELEN, *Judge*.

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

SCHOELEN, *Judge*: The appellant, Brenda McClaskey,[1] through counsel, appeals a March 8, 2016, Board decision in which the Board denied James L. McClaskey ("the veteran") entitlement to a disability rating in excess of 10% prior to October 29, 2013, and in excess of 20% thereafter for spondylolisthesis with degenerative joint disease and deformity, and found that a request for a total disability rating based on individual unemployability (TDIU) had not been raised. Record of Proceedings (R.) at 2-21. This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the

[1] On September 20, 2017, this Court issued a memorandum decision vacating and remanding the March 8, 2016, decision of the Board of Veterans' Appeals (Board). On October 11, 2017, the Court was notified of James L. McClaskey's death on September 2, 2017. On October 12, 2017, the Court entered judgment on the September 20, 2017, memorandum decision. On November 1, 2017, the Court recalled the October 12, 2017, judgment, revoked the September 20, 2017, memorandum decision, reinstated the appeal, ordered counsel for the appellant to provide a copy of James L. McClaskey's death certificate and to show cause why the appeal should not be dismissed. On November 21, 2017, counsel for the appellant filed a motion to substitute Brenda McClaskey, the appellant's sister-in-law and executrix of the appellant's estate. See U.S. VET.APP. R. 43(a)(2). On February 13, 2018, the Court denied Brenda McClaskey's motion to substitute, vacated the March 8, 2016, Board decision, and dismissed the appeal. On March 6, 2018, counsel for the appellant filed a motion for reconsideration or, in the alternative, a panel decision. On May 15, 2018, the Court granted the appellant's motion for reconsideration. On June 29, 2018, the Court granted Brenda McClaskey's motion to substitute and ordered the Clerk of Court to reflect that Brenda McClaskey is the appellant.

following reasons, the Court will vacate the Board's decision and remand the matter for additional development and further proceedings consistent with this decision.

I. BACKGROUND

The veteran served on active duty in the U.S. Army from April 1968 to April 1971, including service in Vietnam. R. at 22. In May 1971, a VA regional office (RO) awarded him VA disability compensation benefits for a back disability and assigned a 10% disability rating.

In May 2006, the veteran informed VA that his back condition had worsened and requested an increased disability rating. R. at 2059. This appeal concerns the adequacy of four VA medical examinations provided in conjunction with the appellant's request for an increased disability rating, and the Court will briefly summarize those examinations.

At a January 2007 VA spine examination, the veteran reported experiencing flareups of his back condition every 3 to 4 months lasting 1 to 2 days at a time. R. at 1114. He stated that he "cannot do anything" until the pain subsides and that rest and medication are alleviating factors. *Id.* Range of motion testing revealed flexion to 90 degrees (normal is 90 degrees), extension to 25 degrees (normal is 30 degrees), left lateral flexion to 30 degrees (normal is 30 degrees or greater), right lateral flexion to 40 degrees, and left and right lateral rotation to 40 degrees on each side (normal is 30 degrees or greater), all with no pain on motion and no pain or additional loss of motion after repetitive-use testing. R. at 1117-18. The examiner noted that the veteran worked for the U.S. Postal Service as a maintenance man but that he was on limited duty because of leg injuries. R. at 1119. The examiner stated that the veteran's back disability interfered with his usual occupation because of problems with lifting and carrying, lack of stamina, weakness or fatigue, and pain. *Id.*

At a September 2009 VA spine examination, the veteran reported severe flareups of his back disability 4 times a year lasting 2 to 3 days at a time. R. at 694. He stated that the flareups were only alleviated by resting. *Id.* Range of motion testing revealed flexion to 75 degrees, extension to 25 degrees, and left lateral rotation, left lateral flexion, right lateral rotation, and right lateral flexion all to 25 degrees. R. at 697. The examiner recorded objective evidence of pain during the range of motion and after repetitive motion, but found no additional functional loss after repetitive motion testing. *Id.* The examiner stated that the veteran's back disability interfered with

his usual occupation as a custodian with the U.S. Postal Service because of problems with lifting and carrying, lack of stamina, weakness or fatigue, and decreased strength. R. at 698.

At an October 2013 VA spine examination, the veteran reported experiencing flareups 2 to 3 times a year for 2 to 3 days at a time and stated that, when the flareups occur, he must "work out the pain." R. at 511. Range of motion testing revealed flexion to 45 degrees with pain beginning at 45 degrees, extension to 15 degrees with pain beginning at 15 degrees, right and left lateral flexion to 15 degrees each with pain beginning at 15 degrees on each side, and left and right lateral rotation to 15 degrees each with pain beginning at 15 degrees on each side. *Id.* There was no additional loss of range of motion after repetitive-use testing. R. at 512. The examiner stated that the veteran had functional loss or functional impairment of the thoracolumbar spine in the nature of less movement than normal; weakened movement; excess fatigability; pain on movement; instability of station; disturbance of locomotion; interference with sitting, standing, and weight-bearing; and severe injuries to both legs. *Id.* The examiner also stated that the veteran's back disability affected his ability to work, explaining:

> It is difficult to separate the functional impact of his back pain from the severe leg injuries that he has had. He has loss of motion of the lumbar spine and without considering the leg wounds, it is safe to say that he has to avoid activities that precipitate and aggravate the back pain. He is limited in the time he can sit, stand[,] or lie down without changing position or activity. He has to avoid daily activities that require lifting, pushing, pulling, reaching, carrying or handling heavy objects[,] as these would increase the duration, frequency[,] and intensity of his pain.

R. at 515.

In a July 2015 fee-based spine examination, the examiner marked a box labeled "no" in response to the question "Does the veteran report that flareups impact the function of the thoracolumbar spine?" R. at 1180. Range of motion testing revealed flexion to 45 degrees with pain beginning at 45 degrees, extension to 0 degrees with pain beginning at 0 degrees, right and left lateral flexion to 10 degrees each with pain beginning at 10 degrees on each side, and left and right lateral rotation to 10 degrees each with pain beginning at 10 degrees on each side. R. at 1181. The veteran was unable to perform repetitive motion testing. *Id.* The examiner stated that the veteran had functional loss or functional impairment in the nature of less movement than normal and pain on movement. R. at 1182. The examiner determined that the veteran's back disability affected his ability to work in that he has chronic back pain and "can[']t lift or sit." R. at 1186. Finally, the examiner stated:

> It is not possible to determine without resorting to mere speculation if additional limitation of motion is present due to pain during flare-ups or when [the] joint is used repeatedly over a period of time, because there is no conceptual or empirical basis for making such a determination without directly observing function under these conditions.

R. at 1187.

In October 2015, the RO increased the veteran's disability rating for spondylolisthesis to 20%, effective June 28, 2015. The veteran filed a Notice of Disagreement with that decision and appealed to the Board.

In March 2016, the Board issued the decision on appeal, granting an effective date of October 29, 2013, for the assignment of a 20% disability rating for the veteran's back disability, but denying entitlement to disability ratings in excess of 10% prior to that date and in excess of 20% from that date. The Board also determined that the matter of entitlement to TDIU had not been raised, either by the veteran or by the evidence of record. This appeal followed.

II. ANALYSIS

A. Disability Rating

On appeal, the veteran contends that the Board erred by failing to account for favorable evidence of functional loss due to his back disability that should result in the assignment of higher disability ratings for the periods on appeal. Included in this argument is an allegation that the VA medical examinations of record do not contain the information necessary to permit the Board to assess functional loss. This argument is persuasive.

In *DeLuca v. Brown*, the Court held that 38 C.F.R. §§ 4.40 and 4.45 require that the disabling effect of painful motion be considered when rating joint disabilities. 8 Vet.App. 202, 205-06 (1995). Under 38 C.F.R. § 4.40 (2017), "Disability of the musculoskeletal system is primarily the inability, due to damage or infection in parts of the system, to perform the normal working movements of the body with normal excursion, strength, speed, coordination and endurance." Further, functional loss "may be due to pain, supported by adequate pathology and evidenced by the visible behavior of the claimant undertaking the motion. Weakness is as important as limitation of motion, and a part which becomes painful on use must be regarded as seriously disabled." *Id.* With regard to the joints, § 4.45 provides that "the factors of disability

reside in reductions of their normal excursion of movements in different planes." 38 C.F.R. § 4.45 (2017).

A VA examination that fails to take into account the relevant factors of §§ 4.40 and 4.45, including those experienced during flareups, is inadequate for evaluation purposes. *See DeLuca*, 8 Vet.App. at 206. For an examination to comply with § 4.40, the examiner specifically must "express an opinion on whether pain could significantly limit functional ability during flareups or [on repetitive use] over a period of time," and the examiner's determination in that regard "should, if feasible, be portrayed in terms of the degree of additional range-of-motion loss due to pain on use or during flare-ups." *Id.*

In *Mitchell v. Shinseki*, the Court reinforced the principle that when an examiner fails to either (1) address functional loss during flareups, or (2) demarcate "whether and at what point during the range of motion the appellant experienced any limitation of motion that was specifically attributable to pain," the examination lacks sufficient detail necessary to permit the assignment of a disability rating. 25 Vet.App. 32, 44 (2011). Such inadequate examinations should be returned to the RO for clarification or the Board should explain why such action is not necessary. *See id.*

Despite acknowledging the veteran's reports of flareups, the January 2007, September 2009, and October 2013 VA examination reports contain no attempt by the examiners to assess his functional loss during flareups, to quantify that functional loss in terms of degrees of additional loss of motion, or to state that such a quantification is not feasible. *See* R. at 511, 515, 694, 1114. As the Court recently explained, "the *VA Clinician's Guide* makes explicit what *DeLuca* clearly implied: it instructs examiners when evaluating certain musculoskeletal conditions to obtain information about the severity, frequency, duration, precipitating and alleviating factors, and extent of functional impairment of flares from the veterans themselves." *Sharp v. Shulkin*, 29 Vet.App. 26, 34, (2017). Even when the claimant is not experiencing a flareup at the time of the examination, a VA examiner must

> elicit relevant information as to the veteran's flares or ask him [or her] to describe the additional functional loss, if any, he [or she] suffered during flares and then estimate the veteran's functional loss due to flares based on all the evidence of record – including the veteran's lay information – or explain why [he or] she could not do so.

Id. The Board failed to account for this missing, yet necessary, information before finding the VA examination reports adequate. *See* 38 U.S.C. § 7104(d)(1); *Mitchell*, 25 Vet.App. at 44; *DeLuca*, 8 Vet.App. at 206.

In light of the examiners' failure to discuss the veteran's loss of function during flareups (which, the Court notes, appears to be nearly total, according to the veteran's "competent" reports to VA, R. at 15), the Court is left to question the medical foundation for the following Board conclusion:

> The Board recognizes the Veteran's complaints of functional loss as a result of his lumbar spine disability, notably his pain, less movement than normal, fatigability and interference with sitting, standing and weight bearing. However, the Board places greater probative value on the objective clinical findings which do not support the Veteran's contentions regarding the severity of his disability.

R. at 13. Moreover, the Court notes that "pain, less movement than normal, fatigability and interference with sitting, standing and weight bearing" are not "complaints" from the appellant as the Board stated, but rather are observations made by two VA examiners regarding the nature of the veteran's functional loss or impairment. *See* R. at 512, 1182.

Given that the Court has found that the Board erred in relying on the VA medical examinations of record for the period before October 29, 2013, for its conclusion that a disability rating in excess of 10% is not warranted for that period, the Court will vacate that part of the Board's decision and remand the matter for further development and readjudication.

With respect to the period beginning October 29, 2013, the Court finds that the Board erred in determining that the July 2015 VA examination was adequate. *See* 38 U.S.C. § 7261(a)(4); *D'Aries v. Peake*, 22 Vet.App. 97, 103 (2008); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). Although the examiner stated that the veteran did not report experiencing flareups, he also noted that the veteran was *unable* to undergo repetitive testing. R. at 1180. Later, however, the examiner explained that it would require speculation to state whether functional loss can occur when the spine is used repetitively over time. These two pieces of evidence appear plainly contradictory. The examiner did not attempt to explain this apparent inconsistency, nor did the Board account for it before finding the examination adequate. It is incumbent on the Board to return an examination that contains such contradictory statements. *See* 38 C.F.R. § 4.2 (2017). The Court will therefore also vacate that part of the Board decision that denied entitlement to a disability rating in excess of 20% for the period beginning October 29, 2013.

On remand, the Board should determine whether an addendum medical opinion is feasible and, if so, the Board will obtain such an opinion. If the examiner is unable to provide an opinion on a particular point, he or she must clearly state why. Further, on remand, the appellant is free to submit additional evidence and argument in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002).

B. TDIU

The appellant argues that the Board erred in finding that TDIU was not reasonably raised by the record. The Court finds no error.

A request for TDIU "is implicitly raised whenever a veteran, who *presents cogent evidence of unemployability*, seeks to obtain a higher disability rating." *Comer v. Peake*, 552 F.3d 1362, 1367 (Fed. Cir. 2009) (emphasis added). Although there is no dispute that the appellant is seeking a higher disability rating, the appellant cites no evidence of unemployability in the record. At best, the evidence the appellant cites reveals that the veteran's back disability had an effect on the type of work he was able to do, as demonstrated by the various VA medical examination reports. The record also reveals, however, that as of May 2015, the veteran had retired after 35 years with the U.S. Postal Service, s*ee* R. at 147 (May 2015 VA post-traumatic stress disorder examination report), and there is no indication or assertion that his retirement was necessitated by his back disability. The record contains no evidence that the veteran was unable to work – that is, that he has been unemployable – during the period on appeal. Accordingly, the Court finds no error in the Board's conclusion that entitlement to TDIU was not raised by the record. *See Robinson v. Shinseki*, 557 F.3d 1355, 1361-62 (Fed. Cir. 2009) (holding that the Board is obligated to consider arguments or issues raised by the record, even if not raised by the claimant). Nevertheless, the Court finds that the issue has now been expressly raised, and the Board will therefore be required to address the veteran's entitlement to TDIU.

III. CONCLUSION

After consideration of the appellant's and the Secretary's pleadings and a review of the record on appeal, the Board's March 8, 2016, decision is VACATED, and the matter is REMANDED for additional development and further proceedings consistent with this decision.

DATED: June 29, 2018

Copies to:

Robert V. Chisholm, Esq.

VA General Counsel (027)